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In The

# Supreme Court of the United States

October Term, 1995

ANTONIO CRESPO,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

WHETHER AN ARREST WITHOUT A WARRANT VIOLATES THE FOURTH AMENDMENT WHEN IT IS JUSTIFIED ON THE BASIS OF FACTS NOT KNOWN TO THE ARRESTING OFFICERS UNTIL AFTER THE ARREST.

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## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the Seventh Circuit Appendix, *infra* A, is reported at 54 F.3d 348. The opinions of the District court, *infra* B, and Magistrate Judge, *infra* C, are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on April 28, 1995. A petition for Rehearing by co-defendant, CARMELLO MOCTEZUMA (hereinafter "Moctezuma"), was denied on May 23, 1995. The Petition for Writ of

Certiorari therefore is due on or before August 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

United States Constitution Amendment IV.

## STATEMENT

Petitioner was a defendant in a criminal case and was convicted of conspiring to possess with intent to distribute multi-kilogram quantities of cocaine in violation of 21 U.S.C. 846. Petitioner was sentenced to a term of 120 months of incarceration.

Prior to trial, Petitioner moved to quash his arrest and suppress certain evidence seized from his person. At the time of his arrest, Petitioner had a telephone pager and $796 in cash in his pockets. Those items, along with a statement made to the arresting officers, were introduced as evidence at his trial.

Magistrate Judge Bobrick conducted a hearing regarding the defendant's pre-trial motions seeking to suppress evidence taken from his person and his statement. Defendant was arrested with Moctezuma, whose pre-trial motions were heard in tandem with those of ANTONIO CRESPO (hereinafter "Crespo"). The Magistrate Judge ruled that D.E.A. agents conducting the search had improperly entered the apartment of Moctezuma and he suppressed a bag containing $48,000 in

cash and a scale taken from Moctezuma's home. However, the Magistrate found that Crespo lacked standing to object to the search of Moctezuma's home.

As to both men, the Magistrate denied their motions to quash arrest. His opinion (appendix C) states as follows:

> **"V. QUASHING OF ARRESTS**
>
> Since we denied defendant Crespo's motion to suppress evidence obtained in the second floor apartment, there certainly exists probable cause to effectuate his arrest. Accordingly, Crespo's motion to quash arrest should be denied. Similarly, with Moctezuma, while we granted the motion to suppress evidence of the bag of money and the triple beam scale, we nonetheless find his incriminating statements to be voluntarily given and legal. This presents probable cause for his arrest. Moctezuma's motion to quash arrest should also be denied."

(Appendix C, p. 25.)

Both defendants filed exceptions to the Magistrate's ruling. The District Court adopted the Magistrate's recommendation and ruled that:

> "After careful consideration of the motions to suppress and quash, the applicable memoranda of law, other relevant pleadings, the transcript of the evidentiary hearing before Magistrate Judge Bobrick, the Magistrate Judge's Report and Recommendation, and the parties' objection thereto, we hereby adopt Magistrate Judge Bobrick's Report and Recommendation. Accordingly, evidence obtained in

> Moctezuma's apartment may be offered into evidence against Crespo, but not against Moctezuma, and all statements made by Moctezuma may be admitted against him.[1] Neither defendants' arrests will be quashed. The government's and the defendants' objections are hereby overruled.
>
> ---
>
> [1] Although Magistrate Judge Bobrick does not appear to have directly applied an attenuation analysis to determine whether the taint of the illegal entry was sufficiently dissipated to permit admission of Moctezuma's statements, his findings support such a conclusion. *See United States v. Fazio*, 914 F.2d 950 (7th Cir. 1990). Accordingly, the statements are properly admissible, and provided probable cause for his arrest. In turn, Magistrate Judge Bobrick properly found that Moctezuma's post-arrest statements are admissible."

(Appendix B, p. 3.)

Following a jury trial at which the evidence seized from Crespo's person and his statement were introduced, Crespo and Moctezuma were convicted.

Both men appealed. The Government confessed error regarding the arrest of Moctezuma stating that:

> "As noted, the Magistrate Judge and district court concluded that Moctezuma's statement was admissible because it followed his lawful arrest. The government respectfully disagrees with the reasoning employed by the district court, and therefore must concede error on this point. Specifically, the government cannot argue that Moctezuma's arrest was legal, because it

appears to have been tainted by the agents' illegal entry into Moctezuma's apartment.

This result follows from either of the two scenarios described by Moctezuma. If Moctezuma was indeed arrested as soon as agents entered the apartment, the taint of the illegal entry could not possibly have dissipated. Alternatively, if Moctezuma was arrested as a result of his comments to Agent Krieg, those comments were prompted by the items seized from Moctezuma's apartment, which were the immediate fruits of the illegal entry. In either case, Moctezuma's arrest stemmed directly from the unlawful entry and was therefore unlawful as well.

Consequently, the statement given by Moctezuma after he was placed under arrest by Agent Krieg, at the scene of the deal, was tainted by the illegality of the arrest. In turn, the statement Moctezuma later made at DEA officers was also tainted and should not have been admitted at trial. *See Brown v. Illinois*, 422 U.S. 590, 604-605 (1975) (defendant's statement following illegal arrest tainted statement given approximately five hours later) *Dunaway v. New York*, 442 U.S. 200, 202, 217 (1979) (statement following illegal arrest tainted statement made one day later).

Because Moctezuma's statement figured prominently in the case against him, the government does not argue that its admission constituted harmless error. The government therefore has agreed that an appellate bond be issued immediately for Moctezuma, pending its decision whether to retry him on the charge of which he was convicted.

> The government did not address this issue in the district court, because it argued and presented evidence that the agents had Moctezuma's consent to enter the apartment, and, further, were justified in entering by virtue of exigent circumstances. O.R. 158 at 12-13, 25-26. Because the entry into Moctezuma's apartment was lawful, the government argued, his arrest was also lawful and his subsequent statement was admissible. After the district court rejected the government's position, but ruled Moctezuma's statement admissible on other grounds, the government did not address the issue further."

(Appellee Brief, Case Nos. 94-1966–94-2009, consolidated.)

The Court of Appeals concurred with the Government's confession of error and vacated Moctezuma's conviction. However, the Court affirmed the conviction of Petitioner Crespo finding that his pre-trial motions had been properly denied. The Court's opinion analyzed the issue as follows:

> "Defendants Luis Velazquez and Crespo contend that the DEA agents did not have probable cause to arrest them and that all evidence seized incident to their arrest should be suppressed as it is tainted by the unlawful arrest and search of their persons.
>
> Law enforcement officials have probable cause to arrest when 'the facts and circumstances within their knowledge and of which they [have] reasonably trustworthy information [are] sufficient to warrant a prudent [person] in believing that the [suspect] had committed or

> was committing an offense.' *Maxwell v. City of Indianapolis*, 998 F.2d 431, 433 (7th Cir. 1993).
>
> In the present case, the DEA agents were advised by Defendant Herrera that he had assembled his 'buyers' at the two apartments for purposes of transacting the drug deal. Defendants Luis Velazquez and Crespo were two of the 'buyers' who Herrera had assembled for purposes of transacting the imminent drug deal. The magistrate judge correctly found, with respect to Luis Velazquez, that there was no other reasons for defendant's presence in the apartment on that day, at that time, other than his involvement in the drug transaction."

(Appendix A, p. 1.)

## REASONS FOR GRANTING THE PETITION

This case presents an issue regarding the requirements of the Fourth Amendment and the use of the exclusionary rule. If it is true that officers can arrest an individual and interrogate them and then justify the arrest on the basis of the interrogation, then the protections provided by the Constitution become meaningless.

### THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S HOLDINGS IN OTHER CASES REGARDING WARRANTLESS ARRESTS AND EVIDENCE RECOVERED AFTER SUCH ARRESTS

This Court has carefully crafted a series of opinions regarding the admissibility of evidence seized following an arrest without probable cause. In *Segura v. United*

*States*, 468 U.S. 796, 808 (1984), this Court dealt with the issue of the seizure of evidence when probable cause is either present or later acquired. In that case, the Court reaffirmed its earlier holdings that, absent probable cause or attenuation, evidence seized illegally should not be admitted at trial.

Clearly, this Court's decision in *Brown v. Illinois*, 422 U.S. 590 (1975), provides that the same rules apply to confessions obtained following an invalid arrest.

The Magistrate's finding that "since we denied Crespo's motion to suppress evidence obtained in the second floor apartment, there certainly exists probable cause to effectuate his arrest," clearly violates the principles contained in the above cases. (Appendix C, p. 25.) Crespo was arrested before the evidence was found, it cannot justify his arrest. Thus, as the conclusion by the courts reviewing this matter directly conflicts with this Court's opinions, review of the matter is warranted.

The Circuit Court's statement that probable cause for arrest is defined by the arresting officers' knowledge is correct. (Appendix A, p. 7.) However, the facts contained in this record do not reveal that the officers had any knowledge about Crespo when they arrested him. The arresting officers in this case entered a building, seeking an unspecified number of individuals, they had no names or descriptions. They admitted that when they testified. The agents arresting Crespo were Krieg and Mitchem.

Mitchem had no knowledge of any particular person or location when the officers forcibly entered Moctezuma's apartment. Agent Mitchem testified at the motion on June 24, 1993 as follows:

"Q. So at the time you entered, did you know whether they were on the first floor or second floor?

A. No, only information we received via our police radio were upstairs."

(Mitchem Tr., 6/24/93, p. 466.) Not only did the agents not know where in the building to look, they also did not know what criminal acts, if any, had been committed by Crespo at the time they arrested him.

This assertion is supported by Agent Krieg's testimony. Krieg admitted that after Crespo had been seized, handcuffed and moved to the basement, the agents still were not aware of any specific criminal activity by the individual defendants.

"Q. Knowing the circumstances that you did, whatever was in your mind at the time that you've walked out to talk to Walsh –

A. Right.

Q. – The existence of those circumstances in your mind, are Crespo, Moctezuma and Jimenez [sic] free to leave?

A. You're asking me to go back and make a judgment that I didn't have to make. If they, if they had been identified and we were satisfied with their identity and they had asked to leave, they may have. If we were not satisfied with their identity and we felt we needed to identify them further, then we would detain them to make sure we could identify them.

So my answer to you is I cannot go back and hypothesize about some event that did not happen."

(Mitchem Tr., 6/23/94, p. 50.)

"Q. And were the handcuffs removed, ever removed in your presence?

A. Yes. When I entered the laundry room, the agent that was in their told me that these three gentlemen had come from the upstairs. We knew that there were people on the second floor upstairs who were involved, but we didn't know what their roles were.

So I told that agent to make sure that he continued to identify who these three men were and remove their handcuffs until we were able to sort everything out."

(Mitchem Tr., 6/23/94, p. 50.) It is apparent that at the time Crespo was seized, the officers lacked the necessary knowledge to justify his detention and custodial interrogation.

And it is just as important to note that Crespo was arrested by the agents who burst into Moctezuma's apartment and who pointed guns in the faces of the three occupants. This Court should note that the Magistrate Judge found testimony regarding the arrest in the apartment before any evidence was found to be truthful. The opinion specifically noted:

"2. **Defendant's Evidence Concerning The Circumstance Surrounding Entry Into Moctezuma's Apartment.**

Our review of the testimony given by defendant Moctezuma and Eladio Jimenez concerning

the events leading to the entry into the second floor apartment by the agents reveal not only continuity and corroboration of the testimony of each of these witnesses, but that the testimony was entirely consistent with earlier statements made by them, as contained in their sworn affidavits filed with the court. These witnesses testified that they were in the living room watching television with Antonio Crespo, when they heard running on the steps. The door burst open and two individuals came into the apartment through the kitchen area. At this time defendant Moctezuma headed towards the kitchen area, whereas Jimenez and Crespo remained in the living room. Moctezuma was confronted by the agents, who told him to put his hands up and place himself against the kitchen counter. (Tr. 295-262, 403, 406).

A review of the testimony finds that essential details of the events surrounding the entry of the agents into the apartment, as described by Moctezuma and Jimenez, was consistent, there being little difference in the recitation of those facts and details regarding entry of the agents into Moctezuma's second floor apartment. We believe it is significant that the defense witnesses' suppression hearing testimony matched the information in the affidavits given by Moctezuma, Crespo, and Jimenez. We find their version of events surrounding a forced warrantless entry into Moctezuma's apartment to be plausible. We find no material inconsistencies in the information given by these witnesses; nor was there any impeachment of the information concerning a warrantless, nonconsensual entry into the apartment. We believe this significant in

> measuring the weight to be accorded the defense witnesses' testimony."

(Appendix C, pp. 14-15.) Thus, it is clear that when Crespo was seized at gunpoint, he was arrested. *United States v. Mendenhall*, 446 U.S. 544 (1980). It is equally clear that the officers who arrested Crespo had no knowledge, until after a subsequent search and interrogation, that he was involved in any illegal activity.

The procedure approved by the Seventh Circuit in this case, arrest everyone at gunpoint, and then look for evidence, is directly contrary to the protections provided by the Fourth Amendment. *Wong Sun v. United States*, 371 U.S. 471 (1963).

This Court should grant this Petition. The Seventh Circuit's disposition of this issue is contrary to well-settled law and, in effect, overrules numerous decisions by this Court.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDIX A

**UNITED STATES of America,**
**Plaintiff-Appellee,**

**v.**

**Axel HERRERA, Anthony Velazquez,**
**Hector Gonzalez, Antonio Crespo,**
**Carmello Moctezuma and Luis Velazquez,**
**Defendants-Appellants.**

**Nos. 94-1966 to 94-1968 and**
**94-2007 to 94-2009.**

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 11, 1995.
Decided April 28, 1995.

Order Modifying Opinion on Denial
of Rehearing May 23, 1995.

Defendants were convicted of conspiring to possess with intent to distribute multikilogram quantities of cocaine, before the United States District Court for the Northern District of Illinois, Marvin E. Aspen, J., and defendants appealed. The Court of Appeals, Paine, District Judge, sitting by designation, held that: (1) evidence was sufficient to support defendants' conviction for conspiracy; (2) defendants were not entitled to jury instruction that proof of buyer-seller relationship by itself is not sufficient to establish conspiracy, as defendants were on same side of transaction; (3) probable cause to arrest defendants existed; (4) prosecutorial misstatement during closing argument did not deprive defendant of fair trial; (5) trial court did not commit clear error in determining drug amounts attributable to each defendant in sentencing; and (6) trial court did not commit clear error in adjusting offense levels of defendants to reflect roles in

conspiracy, or refusing to adjust offense level for acceptance of responsibility.

Affirmed.

Kaarina Salovaara, Gil Soffer (argued), Office of the U.S. Atty., Criminal Div., Barry Rand Elden, Asst. U.S. Atty., Criminal Receiving, Appellate Div., Chicago, IL, for U.S.

Kevin E. Milner (argued), Chicago, IL, for Axel Herrera, Hector Gonzalez.

James J. Cutrone (argued), Chicago, IL, for Anthony Velazquez.

Anthony Pinelli (argued), Chicago, IL, Michael T. Norris, Schaumburg, IL, for Antonio Crespo, Carmello Moctezuma.

Dennis A. Giovannini, Herbert L. Goldberg (argued), Giovannini & Goldberg, Chicago, IL, for Luis Velazquez.

Before CUMMINGS and FLAUM, Circuit Judges, and PAINE, District Judge.*

PAINE, District Judge.

This is an appeal of a final judgment of a United States District Court within this court's jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

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* Hon. James C. Paine, of the Southern District of Florida, sitting by designation.

*Facts*

All of the Defendants[1] were charged in Count I of the Indictment with conspiring to possess with intent to distribute multi-kilogram quantities of cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1) and 18 U.S.C. § 2. Count II of the indictment charged Defendants Herrera, Gonzalez, Anthony Velazquez, and Luis Velazquez with using a firearm during the commission of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) and (2). In Counts III and IV, Defendants Anthony Velazquez and Gonzalez were charged with possessing a firearm despite prior felony convictions, in violation of 18 U.S.C. §§ 922(g)(1) and (2). After a six day trial, the jury returned a guilty verdict against all Defendants on Count I. The jury returned a verdict of not-guilty on all of the remaining counts of the indictment.

In 1992, another drug defendant (the "informant") entered into a plea agreement with the government wherein he agreed to work undercover. In 1993, acting in

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[1] Both in its brief and at oral argument, the government conceded that Defendant Moctezuma's arrest was illegal, and that all subsequent statements made by him to the government thereafter were both tainted by the illegal arrest and played a prominent role in the trial against him. Accordingly, the government has agreed that an appellate bond be issued immediately, pending its decision whether to retry him. The government further confesses that its disposition of the case with respect to Moctezuma renders all remaining arguments advanced by this Defendant to be moot. There is no basis for this court to disagree with the government's confession of error as to this Defendant and, therefore, this opinion does not address his appeal, which is effectively mooted by the government's confession.

his undercover capacity, the informant contacted Defendant Herrera, with whom he had previously engaged in drug deals, in order to arrange a cocaine transaction.

According to the deal, the informant would supply 5 kilos to Herrera for $17,500 per kilo, and Defendant Herrera would broker the cocaine to his buyers. Later, the informant asked Herrera if he could move 15 kilos of cocaine and Herrera said that he could.

On March 10, 1993, the informant and Herrera met at Defendant Anthony Velazquez's residence where they were met by Defendant Gonzalez and proceeded to Defendant Gonzalez's house. While at Gonzalez's house, the guests consumed cocaine and discussed the transaction. Also while at Gonzalez's house, an unidentified man came to the door and gave a bundle of money to Gonzalez. The next day, the informant engaged in a taped telephone conversation with Herrera and informed him that he and his supplier (an undercover DEA agent) had 15 kilos of cocaine to sell. Defendant Herrera said that the deal would have to be done in two transactions. In another taped conversation, Herrera stated that he would get his buyers together at Anthony Velazquez's house where they would wait for the money; the details of the deal were arranged.

That evening, the informant and the agent met Herrera and Anthony Velazquez at Herrera's house and drove to Velazquez's apartment. On the way there, the Defendants said they could have sold about 50 kilos during the previous week and that they wanted this deal to be done in one transaction. When they arrived at the apartment, they learned that the buyers and the money

had not yet arrived. The deal was postponed until the next day.

The next day the informant and Herrera had five taped telephone conversations during which they agreed to complete an eight-kilo deal at Anthony Velazquez's residence. The three (Herrera, the informant, and the agent) again travelled to Anthony Velazquez's apartment in anticipation of doing the deal. Herrera explained the details of the deal – in order to assuage the informant and the agent's fears regarding security, Herrera had arranged for the purchase to take place on two floors of the apartment building. He also expressed interest in doing other deals and that he had five or six good people who would purchase large quantities of cocaine.

After a slight delay, they entered Anthony Velazquez's apartment, accompanied by him, and joined Defendant Gonzalez and two other men who sat at a table full of money. The informant then left the building and gave the arrest signal. Forty minutes prior to the arrest, Defendant Crespo and another man entered the apartment building. Upon receiving the arrest signal, DEA agents entered both the upstairs and the downstairs apartment. In the second floor apartment were Defendants Crespo, Moctezuma, and a third man who was charged in the complaint but the charges were dismissed. They also found a bag filled with $48,000 in cash and a triple beam scale. Crespo was searched and found to be carrying a pager and $796 in cash. In the downstairs apartment, agents discovered Defendants Gonzalez, Anthony Velazquez, Luis Velazquez, and a fourth man. They also discovered a cellular phone, a loaded handgun, an electronic scale, and $55,500 in cash on a table.

After his arrest, defendant Crespo made a statement to the DEA in which he said that he had been approached earlier by Jiminez who said that they could purchase a large quantity of cocaine and that the two raised money for the purchase from friends. He also stated that his role in the deal was to ensure that nothing went wrong and to represent the interest of his money supplier. In return, he expected the supplier to provide him with either money or part of the purchased cocaine.

None of the Defendants testified in their own behalf and the jury returned a verdict of guilty on Count I, the conspiracy charge, against all Defendants.

*Legal Analysis*

*Issue 1: Whether sufficient evidence of a conspiracy existed to support Defendants' convictions?*

The appellate court will reverse a conviction for insufficient evidence only if, after viewing the evidence in a light most favorable to the government, it is determined that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *United States v. Hooks*, 848 F.2d 785, 792 (7th Cir.1988).

In order to prove a defendant guilty of a drug conspiracy, the government must establish beyond a reasonable doubt that a defendant both knew of the conspiracy and was a party to this agreement because he intended to associate himself with the criminal scheme. *United States v. Salazar*, 983 F.2d 778 (7th Cir.1993); *United States v. Byerley*, 999 F.2d 231, 234 (7th Cir.1993).

The Defendants argue that since these men came together on one occasion for one purpose – to buy drugs – that they could not have committed a conspiracy. The Defendants contend that the evidence revealed only the mere purchase or sale of drugs on one occasion without revealing any further involvement by Defendants in an ongoing organization. *See United States v. Townsend*, 924 F.2d 1385 (7th Cir.1991); *United States v. Lechuga*, 994 F.2d 346 (7th Cir.) *cert. denied*, ___ U.S. ___, 114 S.Ct. 482, 126 L.Ed.2d 433 (1993). However, those cases address a single sale by one defendant to another defendant and hold that the single sale between Defendants is an insufficient basis for a finding of a conspiracy. In *Lechuga*, the court found that as long as the defendants were individually on opposite sides of the sale – one was buying alone and one was selling alone – they could not have conspired together to distribute cocaine. *Lechuga* stands for the proposition that mere evidence of one sale of narcotics, without more, is inadequate to support a conviction of the buyer and seller for conspiracy to distribute narcotics. *United States v. Baskin-Bey*, 45 F.3d 200, 205 (7th Cir.1995). In the present case, all of the Defendants are on one side of the cocaine deal – the buying side. The argument that this single purchase by the conspiring Defendants is insufficient to satisfy the conspiracy requirement is without merit. As in *Baskin-Bey*, the transaction at issue in the present case was the purchase that resulted from the Defendants' conspiracy to buy cocaine. In that proposed transaction, all of the Defendants were buyers. The government was the putative seller. Therefore, because the Defendants were on the same side of the relevant transaction, *Lechuga* is inapplicable. *Id.*

Under the stringent burden of sufficiency of the evidence, and weighing the evidence in the light most favorable to the government as we must, it cannot be said that the Defendants' convictions should be overturned for insufficient evidence. Every one of the charged Defendants was present and identified as a buyer by Herrera on the date, at the place and time the sale was to take place. They were all in custody of sufficient sums to make the purchase of the cocaine. Herrera told the informant and the agent that he was assembling his "buyers" who would purchase the cocaine (from the government – the putative seller) and distribute it; the people he assembled are the Defendants in this case. The evidence is sufficient to sustain the jury's verdict of guilty on the conspiracy charge.

*Issue 2: Whether the district court correctly denied Defendants Gonzalez's and Velazquez's proposed jury instructions?*

In reviewing the fitness of jury instructions to which objections were properly raised in the proceedings below, "we must determine from looking at the charge as a whole, whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues." *United States v. Abdelkoui*, 19 F.3d 1178 (7th Cir.1994) (quotation, citations omitted). "The question of whether a jury has been properly instructed is to be determined not upon consideration of a single paragraph, sentence, phrase or word, but upon the charge as a whole." *United States v. Alexander*, 743 F.2d 472, 478 (7th Cir.1984). So long as the instructions treat

the issues fairly and adequately, they will not be interfered with on appeal. *United States v. Strickland,* 935 F.2d 822, 826 (7th Cir.1991).

A defendant in a criminal case is entitled to have the jury consider any theory of the defense that is supported by law and that has some foundation in the evidence. *United States v. Douglas,* 818 F.2d 1317 (7th Cir.1987). A defendant is entitled to an instruction on that theory of defense if: the defendant proposes a correct statement of the law; the theory is supported by the evidence; the theory of defense is not part of the charge; and the failure to include such an instruction would deny the defendant a fair trial. Id. at 1320-21.

In the present case, the Defendants Gonzalez and Luis Velazquez asked the court to give the following instruction: "Proof of a buyer-seller relationship, without more, is insufficient to establish a conspiracy." While this again is a proper statement of the law – i.e. defendants on opposite sides of a single purchase and sale arrangement cannot be said to have conspired together – this charge is not supported by the evidence in this case. The evidence in this case establishes that all of the Defendants were on the *same* side of the purchase and sale agreement – they were purchasers who were conspiring together to purchase and distribute cocaine. The law that forbids a finding of a conspiracy when the defendants are not acting together to distribute but are on opposite sides of a single deal, does not forbid a finding of a conspiracy in the present case. The Defendants are only entitled to a particular jury instruction when there is some evidence to support the theory behind the instruction. *United States v. Townsend,* 924 F.2d 1385, 1414 (7th Cir.1991). Therefore,

because there was no evidence to support the requested instruction in relation to the crime charged, the district court properly denied giving the instruction. *See Baskin-Bey*, 45 F.3d at 205 n. 2 (not only would a buyer-seller instruction have been surplus verbiage, it might well have misled the jury).

*Issue 3: Whether the district court correctly denied Defendants Luis Velazquez's and Crespo's Motions to Quash Arrest and Suppress Evidence?*

A decision regarding the admission of evidence is within the broad discretion of the trial judge, and will be overturned only upon a "clear abuse of that considerable discretion." *United States v. Harris*, 914 F.2d 927, 932 (7th Cir.1990).

Defendants Luis Velazquez and Crespo contend that the DEA agents did not have probable cause to arrest them and that all evidence seized incident to their arrest should be suppressed as it is tainted by the unlawful arrest and search of their persons.

Law enforcement officials have probable cause to arrest when "the facts and circumstances within their knowledge and of which they [have] reasonably trustworthy information [are] sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense." *Maxwell v. City of Indianapolis*, 998 F.2d 431, 433 (7th Cir.1993).

In the present case, the DEA agents were advised by Defendant Herrera that he had assembled his "buyers" at the two apartments for purposes of transacting the drug

deal. Defendants Luis Velazquez and Crespo were two of the "buyers" whom Herrera had assembled for purposes of transacting the imminent drug deal. The magistrate judge correctly found, with respect to Luis Velazquez, that there was no other reason for defendant's presence in the apartment on that day, at that time, other than his involvement in the drug transaction.

The magistrate judge also correctly rejected Crespo's claim that he had a fourth amendment right to privacy in Moctezuma's apartment, on the grounds that he lacked standing to assert such a reasonable expectation of privacy in an apartment in which he had no ownership interest. *See United States v. Duprey,* 895 F.2d 303, 309 (7th Cir.1989), *cert. denied,* 495 U.S. 906, 110 S.Ct. 1927, 109 L.Ed.2d 291 (1990) (no standing absent possessory or ownership interest in car). Additionally, for the same reasons stated with respect to Defendant Luis Velazquez' claim, the DEA agents had probable cause to arrest and search Defendant Crespo, who was in the apartment at the time the deal was to take place. Therefore, it cannot be said that the evidence seized from his person was the fruit of an illegal search.

Accordingly, the district court properly adopted the magistrate judge's report and recommendation and denied these motions.

*Issue No. 4: Whether Defendant Crespo was denied a fair trial because of statements made by the prosecutor during closing argument?*

When a Defendant raised contemporaneous objections to a prosecutor's remarks at trial, this court must

review the objections on appeal to "determine whether those remarks were so prejudicial as to deprive the defendant of a fair trial." *United States v. Fakhoury*, 819 F.2d 1415, 1422 (7th Cir.1987), *cert. denied*, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988).

In closing argument, the prosecutor said of Defendant Crespo:

> Antonio Crespo . . . shows up at the appointed place at the appointed time on the appointed date with $48,000 in cash, the cash that was in this white Crate and Barrel bag that Agent Tucci testified about. He also shows up with a scale, and you've heard about the scale and you've heard about the uses and purposes of scales.
>
> Money – bringing money to a drug deal, needless to say, facilitates the purchase of drugs.

Defendant Crespo contends that this statement is not supported by the evidence. The evidence shows that Crespo told the DEA agents that he had raised money for the deal and that he was there to represent the interests of his supplier. At least part of this statement – the part that charges that he brought money to the deal – does appear to be supported by the evidence. The Defendant correctly notes that there is no evidence that Crespo brought the scale to the apartment. However, the court instructed the jury that "closing arguments and any other statements of counsel should be disregarded to the extent they are not supported by the evidence." Such an instruction is sufficient to overcome any prejudicial effect arising from these prosecutorial misstatements. *See, United States v. Van Wyhe*, 965 F.2d 528, 533 (7th Cir.1992). Accordingly, the slight deviation from the evidence in closing argument

did not deprive Defendant Crespo of a fair trial and does not warrant reversal of his conviction.

*Issue No. 5: Whether the district court committed clear error when it determined the amount of cocaine reasonably foreseeable to Defendants Gonzalez and Luis Velazquez, for sentencing purposes?*

A sentencing court's determination of drug amounts is a finding of fact and is reviewed for clear error. *United States v. Paters,* 16 F.3d 188, 191 (7th Cir.1994).

The district court did not commit clear error when it determined the amount of cocaine reasonably foreseeable to Defendants Gonzalez and Luis Velazquez, for sentencing purposes. The district court arrived at drug amounts by dividing the amount of money attributable to each defendant in question by the per-kilo price of cocaine. No Defendant challenged this aspect of the court's calculation.

The district court sentenced Defendant Gonzalez on the full amount of the cocaine contained in both apartments, presumably because the purchase of cocaine in both the upstairs and downstairs apartments was foreseeable to him. It is relevant that the evidence established that the deal was to take place in the two separate apartments solely to assuage the fears expressed by the informant to Herrera that for security purposes there not be a large number of persons present at the transaction. The evidence established and it could reasonably be inferred, that Gonzalez, with whom the informant met on his first night in Chicago, knew the full scope of the intended purchase – not just the purchase in the one

apartment. It cannot be said that the district court's factual finding with respect to defendant Gonzalez on this sentencing issue was clearly erroneous.

With respect to Defendant Luis Velazquez, the court attributed only four kilos to him for sentencing purposes. This is the amount represented by the money in the downstairs apartment only. The Defendant argues that because he only had $15,000 on his person, he should not be charged with the entire amount of the cocaine attributed to the downstairs apartment. For the same aforestated reasons that support the conspiracy conviction, the district court's attribution of the full amount of the cocaine attributable to the downstairs apartment to this Defendant cannot be said to be clearly erroneous. The district court's conclusion that this Defendant could reasonably foresee the intended purchase of four kilos of cocaine was a reasonable inference, supported by the evidence.

*Issue No. 6: Did the district court commit clear error in adjusting the offense levels of Luis and Anthony Velazquez to reflect their roles in the offense and in refusing to find that Anthony Velazquez had accepted responsibility for his offense for sentencing purposes?*

A sentencing judge's determination concerning a defendant's role in an offense is a finding of fact, subject to review for clear error. *United States v. Yanez*, 985 F.2d 371, 374 (7th Cir.1993). This court should not find that a finding of fact is clearly erroneous unless upon review it is left "with a definite and firm conviction that a mistake

has been committed." *United States v. Herrera*, 878 F.2d 997, 1000 (7th Cir.1989).

The district court did not commit clear error in adjusting the offense levels of Luis and Anthony Velazquez to reflect their roles in the offense and in refusing to find that Anthony Velazquez had accepted responsibility for his offense, for sentencing purposes.

Regarding Luis Velazquez, the district court correctly decreased his offense level on the grounds that he was only a "minor participant." The Defendant contends that he was a "minimal participant", thereby entitling him to a four- level reduction. Because Velazquez had on his person $15,000 at the time of the arrest, it cannot be said that he was only a minimal participant in the deal. The district court's finding that he was a minor participant as opposed to a minimal participant was not clearly erroneous.

Regarding Anthony Velazquez's role in the conspiracy, the district court accepted the Probation Department's recommendation of a three level enhancement based on the fact that he was a manager or supervisor. The evidence supports a finding that Anthony Velazquez was more than a mere participant. He was present with the informant and the agent on the prior occasions when the deal was both discussed and delayed. It was not clear error for the district court to hold as a matter of fact that this Defendant had management responsibilities over the activities of the conspiracy.

Finally, the district court determined that Defendant Gonzalez was not entitled to a two point reduction for acceptance of responsibility. Velazquez argues that he

went to trial solely to preserve an issue for appeal with respect to whether a conspiracy exists when there is a single purchase and sale and co-defendants are on the same side of the conspiracy. It cannot be said under the evidence presented that this Defendant who went to trial and disputed the factual basis for the government's defense accepted responsibility so that he would be entitled to a downward departure for sentencing purposes. The district court's finding of fact on this issue was, therefore, not clearly erroneous.

In view of all of the foregoing, the judgment of the district court as to each Defendant is AFFIRMED.

ORDER

May 23, 1995

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by defendant-appellant on May 12, 1995, the opinion of the Court entered April 28, 1995, is modified to reflect that, based upon the government's confession of error, the judgment in this criminal case against defendant Carmello Moctezuma is VACATED and the case is REMANDED for any further proceedings. In all other respects, the opinion of the Court remains unchanged.

The petition for rehearing is denied.

# APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Michael T. Norris
1701 East Woodfield Road
Suite 1101
Schaumburg, Il 60173

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Case Number: 1:93-cr-00172

Title: USA v. Herrera

Assigned Judge: Honorable Marvin E. Aspen

MINUTE ORDER of 8/31/93 by Hon. Marvin E. Aspen as to defendants Antonio Crespo and Carmelo Moctezuma: We hereby adopt Magistrate Judge Bobrick's report and recommendation. For the reasons set forth on the reverse of this minute order, the government's and the defendants' objections are hereby overruled. (See reverse of minute order). Mailed notice

This order was entered on the docket by the Clerk September 1, 1993

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

Minute Order Form (rev. 12/90)

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of assigned Judge
or Magistrate Judge MARVIN E. ASPEN

* * *

Case Number 93 CR 172

Date August 31, 1993

Case Title UNITED STATES OF AMERICA v. ANTONIO CRESPO AND CARMELLO MOCTEZUMA

* * *

(10) X [Other docket entry] We hereby adopt Magistrate Judge Bobrick's Report and Recommendation. For the reasons set forth on the reverse of this minute order, the government's and the defendants' objections are hereby overruled.

(11) X [For further detail see
X order on the reverse of

* * *

X Docketing to mail notices.

* * *

pl Courtroom deputy's initials

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Date/time received in central Clerk's Office

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| 5 | number of notices |
| SEP 01 1993 | date docketed |
| JP | docketing dpty. initials |
| SEP 01 1993 | date mailed notice |
| JP | mailing dpty. initials |

Document # 183

(Reserved for use by the Court)

**ORDER**

On July 2, 1993, Magistrate Judge Edward A. Bobrick filed and served upon the parties his Report and Recommendation concerning defendants' Antonio Crespo and Carmello Moctezuma's combined motions to quash their arrests and suppress evidence, and Moctezuma's motion to suppress statements. Magistrate Judge Bobrick recommended that the physical evidence obtained in Moctezuma's apartment be suppressed as against Moctezuma, but admitted as to Crespo. He further recommended that Crespo's and Moctezuma's arrests be upheld, and that Moctezuma's pre- and post-arrest statements be admitted.

After careful consideration of the motions to suppress and quash, the applicable memoranda of law, other relevant pleadings, the transcript of the evidentiary hearing before Magistrate Judge Bobrick, the Magistrate Judge's Report and Recommendation, and the parties' objection thereto, we hereby adopt Magistrate Judge Bobrick's Report and Recommendation. Accordingly, evidence obtained in Moctezuma's apartment may be offered into evidence against Crespo, but not against

Moctezuma, and all statements made by Moctezuma may be admitted against him.[1] Neither defendants' arrest will be quashed. The government's and the defendants' objections are hereby overruled.

/s/ MEA

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[1] Although Magistrate Judge Bobrick does not appear to have directly applied an attenuation analysis to determine whether the taint of the illegal entry was sufficiently dissipated to permit admission of Moctezuma's pre-arrest statements, his findings support such a conclusion. *See United States v. Fazio*, 914 F.2d 950 (7th Cir. 1990). Accordingly, the statements are properly admissible, and provided probable cause for his arrest. In turn, Magistrate Judge Bobrick properly found that Moctezuma's post-arrest statements are admissible.

# APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| | ) | No. 93 CR 172 |
| vs. | ) | |
| LUIS VELAZQUEZ, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

HONORABLE MARVIN E. ASPEN, JUDGE
UNITED STATES DISTRICT COURT

HONORABLE JUDGE:

REPORT AND RECOMMENDATION
of Magistrate Judge Edward A. Bobrick

Before the court is the combined motion of defendants Carmello Moctezuma and Antonio Crespo to quash arrest and suppress evidence, and the motion of Carmello Moctezuma to suppress statements. This matter revolved around the arrest of defendants on March 12, 1993, at 3431 N. Kildare in Chicago, the time, place, manner, and circumstances of which are the subject of considerable dispute between the government and the defendants.

Defendants' combined motion is aimed at quashing their arrests and suppressing all evidence seized in defendant Moctezuma's second floor apartment. Moctezuma's motion to suppress is aimed at pre- and post-arrest oral and written statements he gave to the government.

According to defendants, at approximately 4:00 p.m. on March 12, 1993, they were in Moctezuma's apartment watching television and had been for at least an hour or

so. Eladio Jimenez was also present. Suddenly, two Drug Enforcement Agency ("DEA") agents forcibly entered the apartment. Neither of the agents possessed an arrest or a search warrant. Defendants deny that consent to enter the apartment was given to any of the agents by them or by anyone else. Defendants were each handcuffed, ostensibly placed under arrest, and the apartment was subjected to a nonconsensual warrantless search. A bag containing $48,000 in bundled money, and a triple beam scale was found in the Moctezuma apartment. Defendants maintain that both the arrest and search were without probable cause and the search of his apartment was without consent, in violation of their Fourth Amendment Rights, thus subjecting the evidence and any statements made by them to suppression.

Defendant Moctezuma further adds that he was coerced into signing a waiver of his Miranda rights and coerced into giving pre-and post-arrest statements. He implies that at the time of giving a written statement he was incapacitated by reason of an epileptic condition from which he suffers.

The government, in response to the allegations made by defendants, submits that defendant Moctezuma had given his express consent to allow the agents to enter his apartment and that it was through a consensual search that the evidence now being sought to be suppressed was revealed. The government also maintains that there was pursuit of the defendants into their apartment allowing for its entry even without consent under the theory of "hot pursuit" and that this was an exigent circumstance that allowed for a nonconsensual entry into the apartment. As part of the exigent circumstances theory, the

government points out that arrest of other drug dealers had taken place in the basement, that the arresting DEA agents had reason to believe that other suspects were in the upper floors, and that the defendant-suspects located on the second floor posed a possible danger to the agents downstairs.

On June 22-24, 1993, a hearing was held in this matter at which ten witnesses testified and 24 documents were received in evidence. It is from the credible facts learned at the hearing that we reach our conclusions. After giving careful consideration to the testimony of the witnesses, their demeanor, their recollection of events in terms of time, place, and sequence, we reach certain factual conclusions herein. At this point it needs mentioning that by reason of the parties' vastly differing accounts of the events occurring at the first and second floor apartment of the Kildare residence, our conclusions did not come easily.[1] When applying the law to the reliable and credible material facts of this case we conclude that defendant Carmello Moctezuma's motion to suppress evidence should be granted, defendant Antonio Crespo's motion to suppress evidence should be denied, and that defendant Carmello Moctezuma's motion to suppress statements should be denied. The combined motions to quash arrests should also be denied.

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[1] It did not help matters any that all of the government's briefs and affidavits contained varying versions of material facts concerning the circumstances leading to the alleged consensual entry into the second floor apartment. Moreover, the agents testified to yet another version at the suppression hearing.

## I. BACKGROUND

On March 12, 1993, the DEA and Department of Justice set up a "sting" operation at 3431 N. Kildare Avenue in Chicago, Illinois, wherein an undercover DEA agent would offer to sell cocaine to prospective buyers. The operation came to fruition when agents arrested a number of defendants in the basement of the Kildare residence.[2] The agents, before the time of the basement arrests, knew that additional buyers were located somewhere on the upper floors of the residence. (Tr. 465-466, 472, 474, 477-479)

Initially the government's version of events occurring subsequent to the basement arrests went as follows:

> As agents arrested defendants Herrera, A. Velazquez, Gonzalez, and L. Velazquez downstairs, another agent knocked on the door of the first floor apartment, announced his office to a female resident, and was allowed inside by this female resident. Shortly after entering that apartment, the agent heard footsteps running up an exterior staircase located in the back of the building. The agent ran through the first floor apartment, stopped on the first floor landing of the staircase and identified himself as a police officer. The agent asked Moctezuma how many people were in the apartment and Moctezuma replied that a total of three people were inside. The agent then asked Moctezuma whether Moctezuma would mind if he came up to the apartment to look around. Moctezuma gave his

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[2] For a more detailed narrative of events leading to the basement arrests, see Magistrate Judge Edward A. Bobrick's Report and Recommendation dated June 3, 1993.

> consent and the agent proceeded upstairs followed by another agent. In the apartment, the agents found Moctezuma, Crespo and Eladio Jimenez ("Jimenez")[3] and brought them to a hallway in the basement. Agents then returned to the upstairs apartment to conduct a security sweep. In a crawl space adjacent to the second floor room where defendants Moctezuma lived and where he was arrested along with defendant Crespo, agents recovered approximately $48,000 and a triple beam scale. Agents also recovered pagers from all of the defendants.
>
> Following their arrests, defendants Crespo and Moctezuma gave post-arrest statements . . .

(Government's Supplemental Response to Defendants' Motions to Quash Arrests and Suppress Evidence, p. 2, 3).

The defendants, on the other hand, deny the entirety of the government's rendition of those facts occurring on the second floor. Specifically, defendant Moctezuma denies giving his consent to the DEA agent to enter his apartment. According to the defendants, the events of the afternoon of March 12, 1993, went as follows:

> Eladio Jimenez, Antonio Crespo, and Carmello Moctezuma were all present in the living room of Moctezuma's second floor apartment. At approximately 4:00 p.m., they heard people running up the stairs from the first floor of the apartment to the second floor apartment. Two (2) individuals then burst into the apartment and into the kitchen of the apartment with their guns drawn. Once these individuals, later learned to be Police Officers, were in the

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[3] Eladio Jimenez was not indicted in this case.

kitchen, they yelled from the kitchen to the living room asking "Who was in there?" Moctezuma asked who it was and they said "Federales" and "Policia" and told Moctezuma to "Freeze." At that point the agents were in the kitchen and defendant Moctezuma was in the living room. They told Moctezuma to come from the living room into the kitchen, and to "Put your hands on the counter," which Moctezuma did. The agents asked at that time if there were any other individuals in the house and Antonio Crespo and Eladio Jimenez responded that they were also present. These agents told Antonio Crespo and Eladio Jimenez to come out and put their hands also on the kitchen counter and to spread their legs. Antonio Crespo and Eladio Jimenez followed their instructions. Both DEA agents had their weapons out and both of these individuals had their weapons pointed at Moctezuma's direction.

At no time on March 12, 1993 did either of the DEA agents come to the bottom of the stairs and call out to Moctezuma to identify himself. At no time did Moctezuma come to the top of the stairs and speak to the DEA Moctezuma agents in response to questions spoken to him. Moctezuma further maintained that at no time did any DEA Moctezuma agent asked him if "they could come up and look around," and at no time did he respond "O.K." Nor did Moctezuma ever give any consent for any individuals to come up the stairs and into his residence. (Affidavits of Carmello Moctezuma, Antonio Crespo, and Eladio Jimenez)

It is this disputed factual portrayal that precipitated the hearing of June 22-24, 1993.

## II. BURDEN OF PROOF

While The issue of whether consent was given the agents to enter defendant Moctezuma's apartment is raised by defendants in their Motion to Suppress, the government bears the burden of proof on the issue of the legality of the warrantless search.

The general rule on Fourth Amendment challenges to search and seizures is that if the police acted without a warrant, the prosecution bears the burden of establishing legality. *United States v. Longmire*, 701 F.2d 1411, 417 (7th Cir. 1985).[4] Also as a general matter, the controlling burden of proof at suppression hearings is that of proof by a preponderance of the evidence. *U.S. v. Gillespie*, 974 F.2d 796 (7th Cir. 1992). Likewise in matters dealing with waiver of Miranda rights, such as is the subject of Moctezuma's motion to suppress statements, the burden to preponderate on the issue of legality rests with the government. *Colorado v. Connelly*, 479 U.S. 157, 168-169, 107 S.Ct. 515, 522-523 (1986).

## III. DEFENDANT CRESPO'S MOTION TO QUASH ARREST AND SUPPRESS EVIDENCE

Defendant Crespo joined with defendant Moctezuma to quash the arrests and suppress all evidence seized as result of a search immediately following their arrest. Crespo complains that the entry into the apartment was

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[4] If the search or seizure was affected pursuant to a warrant, the defendant would bear the burden of establishing illegality. *Longmire*, 701 F.2d at 417.

without his or Carmello Moctezuma's consent, in violation of his Fourth Amendment Right. We find as a matter of law defendant Crespo's motion should be denied.

Defendant Crespo was a momentary guest in the Moctezuma apartment. He had been in the apartment about one hour, and was not expected to stay much longer (he was certainly not an overnight guest). As such, he is not entitled to claim any Fourth Amendment Rights. As to the alleged illegal entry by the agents into Moctezuma's apartment and the seizure of evidence, only defendant Moctezuma can impose a Fourth Amendment claim since it is his privacy rights that are in issue. Crespo cannot make such a claim since he had no privacy interest to protect in Moctezuma's apartment. "Fourth Amendment Rights are personal rights which, like some other constitutional right may not be vicariously asserted." *U.S. v. Randle*, 966 F.2d, 1209, 1212-1213 (7th Cir. 1992); *Rakas v. Illinois*, 439 U.S. 128, 133-134, 99 S.Ct. 421, 425 (1972).

We need not decide in Crespo's case if the seizure of the evidence in Moctezuma's apartment was legal or not, for a person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. *Rakas*, 439 U.S. at 133, 95 S.Ct. at 425. Accordingly, Crespo's motion to quash arrest and suppress evidence must be denied.

As an aside, this Magistrate Judge is without information as to whether Crespo makes a proprietary claim to the bag containing the $48,000, and the triple beam

scale, so as to assert some arcane claim of privacy entitling him to Fourth Amendment protections. We do know he has thus far failed to make such an argument. In any event, under the circumstances of this case, and looking to the totality of the facts, he could hardly have any legitimate expectations of privacy when as a momentary house guest, he places a bag full of money on the floor of a bedroom storage area. Ownership is but one factor of many to consider in Fourth Amendment claims. We would find that Crespo would lose on this issue if he were to raise it. *Rawlings v. Kentucky*, 448 U.S. 98, 104-106; 100 S.Ct. 2556, 2561-2562.

## IV. MOCTEZUMA'S MOTION TO SUPPRESS

At earlier discussed, the government bears the burden of proof on the contested issue of whether the agents' warrantless entry into Moctezuma's second floor apartment was consensual. Thus, if the government is not able to carry this burden by a preponderance of evidence, we must find in favor of the defendant Moctezuma, holding that the search was illegal. We believe that as to the issue of the existence of a consensual entry, the government has not been able to mount sufficient evidence which was of greater weight than the evidence offered by the defendant in opposition. We reach this conclusion for four distinct reasons:

> (1) the nature and reliability of the varying and changing account of events regarding entry into and through the Kildare residence and onto the second floor steps, as given by Agent Mitchem, the sole DEA agent involved in and privy to the conversation with Moctezuma – as to the

alleged consent to enter. Agent Mitchem's sworn affidavit filed with the court and his testimony given in the suppression hearing, in material part, offered too many inconsistencies.

(2) The consistent, corroborated and plausible rendition of events given by Moctezuma and Jimenez, in their affidavits, (as well as in an affidavit filed by defendant Crespo), and through their testimony at the suppression hearing.

(3) The corrobative nature of Moctezuma's written statement, taken by the DEA agent, which more closely fit defendant's version of events concerning the warrantless entry into the second floor apartment than that which was given by the government.

(4) The absence of any concordant testimony or evidence corroborating Agent Mitchem's description of events that took place on the second floor steps prior to and during entry into Moctezuma's apartment.

1. Agent Mitchem's Testimony

The government's evidence of Moctezuma's alleged consent to entry by the DEA agents into his apartment comes solely through the testimony of Agent Carlos Mitchem. Of the government's witnesses, it is he alone who initiated the conversation and it is he alone who was privy to it. While a second agent joined Agent Mitchem as he proceeded up the steps, he apparently did not hear the exchange between Agent Mitchem and Moctezuma. Thus, the government's case as to existence of a consensual entry rests for the most part on the strength of Agent

Mitchem's testimony alone. Accordingly, careful consideration must be given to his testimony, since the matter of consent to enter is the seminal challenged fact by defendants in these proceedings.

As part of the suppression proceedings, at the request of the court, the government filed with the court, the sworn affidavit of Agent Mitchem, in which he states, in applicable part, as follows:

> "On Monday I was acting as a surveillance agent at a building located at 3431 N. Kildare in Chicago . . . I knocked on the front door of the first floor apartment. A woman opened the door and gave me permission to enter her residence. After entering this apartment, I heard a person or persons running up a stairway located in the back of the building. I ran to the base of the stairway, identified myself as a police officer, and asked the person or persons upstairs to identify themselves. Moctezuma came to the top of the stairs and I asked him if there were other people upstairs. When Moctezuma said that there were, I asked everyone to show themselves. Two other individuals, defendants Crespo and Eladio Jimenez showed themselves.
>
> I asked Moctezuma what he and the others were doing and he replied they were watching television. I then asked Moctezuma if I could come up and look around to which he responded, "okay . . . "

(Govt.'s Supplemental Response to Defendant's Motions to Quash Arrest and Suppress Evidence, Affidavit of Carlos Mitchem dated May 19, 1993).

At the suppression hearing, Agent Mitchem's version of the events at issue changed dramatically from that contained in his affidavit. At the hearing of June 22, 1993, he testified that he entered into the Kildare residence from the rear and not from the front (Tr. 159). After momentarily entering the first floor apartment, he heard some noise on the stairs, exited the first floor apartment, and went to the base of the steps (Tr. 160). Agent Mitchem then testified he announced himself as a police officer and asked if anybody was upstairs. (Tr. 160). Defendant Moctezuma then came to the top of the steps, at which time the reported conversation concerning the consent to enter between Agent Mitchem and defendant Moctezuma occurred (Tr. 161).

Agent Mitchem went on to testify as to the circumstances of his entrance into the residence. He indicated that he entered into the residence through a door at the back of the house (Tr. 472). The door he entered was not the door leading to the basement apartment; that door is depicted in defendant's Exhibit 5 and identified by a "X" mark on the exhibit (Tr. 173). He indicated he knocked on the door and a lady came to the door within a couple of seconds. (Tr. 173). He advised her that he was a police officer and showed his credentials. He testified she permitted him into the residence and he entered a couple of steps into the residence. He could not now recall what the surroundings looked like. He testified he heard noises on the stairs. (Tr. 180, 181). He was unsure whether this was a person running, stomping, or loudly walking (Tr. 181), although in his affidavit he stated "I heard a person or persons running up a stairway located in the back of the building." He testified that when he heard the noise, he

went to the base of the stairs leading to the second floor, these stairs being within the structure of the woman's house. (Tr. 182, 185; Defendant's Ex. 9). At that point he stated, "I'm a police officer. I'm a police officer. Who is up there?" He spoke no Spanish words (Tr. 186). Moctezuma then came out of his apartment to the steps. The agent could not recall the configuration of the steps in relation to where Moctezuma stood. (Tr. 188). The other two individuals came out to where the agent could see them. After some additional conversation and directions to the three individuals, the agent then asked, "Is it okay if I come up and look around?" to which Moctezuma stated, "Yeah, okay." (Tr. 162, 193). Then, with Agent Walsh near his side, Agent Mitchem proceeded up the steps. (Tr. 162, 194, 203).

In response to the court's question, Agent Mitchem stated he remembered "going back out" the lady's apartment (Tr. 201). He further stated "To come out of the second floor I believe I went through her apartment." We conclude these statements by Agent Mitchem show that he was inaccurate in recalling his movements in the building. His earlier testimony indicated he went into the outside rear door that led to the flight of steps leading to the second floor. There is a landing several steps up that does have a door to the first floor apartment, but Agent Mitchem did not, nor could have, placed himself there. From his testimony at trial he could not have entered the first floor apartment and gone through it. (Tr. 251-252, 460-461, Defendant's Exs. 9-13).

We conclude that the unsure recitation of Agent Mitchem of his progress into the residence through the first floor apartment and onto the steps degrades the weight

that can be assessed to his testimony as to the events leading up to the alleged conversation dealing with consent to enter. It is additionally not helpful to the weight this court will ascribe to this portion of the government's testimonial evidence that there is a complete change in the description of Agent Mitchem's entrance into the residence, through the residence, and then onto the steps leading to the second floor from that which the witness initially made in his sworn affidavit filed with the court. Additionally, Agent Mitchem's statements in his affidavit and his testimony to the effect that the noise he had heard on the steps was that of somebody running up the steps (Mitchem's Affidavit, ¶ 4; Tr. 182), appears an unlikely scenario since two DEA agents were at the rear of the house protecting the exits and entrances. (Tr. 118). There was one door in the rear of the house that led to the steps of the second floor. It was not possible to enter onto the steps and proceed without drawing the attention of the agents posted at the rear. Agent Mitchem places himself near the door to the first floor apartment when he heard the noice, thus having full view of the area.

We discuss these matters for the purpose of and in terms of the weight that should be assessed this testimonial evidence. By reason of the inconsistencies in the statements made by Agent Mitchem in his sworn affidavit filed with the court and the inconsistencies given at the hearing, we give no more weight to this testimonial evidence concerning the consensual entry by the agents, than we do to the defendant's testimonial evidence concerning a forced, warrantless, nonconsensual entry into Moctezuma's apartment.

2. Defendant's Evidence Concerning The Circumstance Surrounding Entry Into Moctezuma's Apartment.

Our review of the testimony given by defendant Moctezuma and Eladio Jimenez concerning the events leading to the entry into the second floor apartment by the agents reveal not only continuity and corroboration of the testimony of each of these witnesses, but that the testimony was entirely consistent with earlier statements made by them, as contained in their sworn affidavits filed with the court. These witnesses testified that they were in the living room watching television with Antonio Crespo, when they heard running on the steps. The door burst open and two individuals came into the apartment through the kitchen area. At this time defendant Moctezuma headed towards the kitchen area, whereas Jimenez and Crespo remained in the living room. Moctezuma was confronted by the agents, who told him to put his hands up and place himself against the kitchen counter. (Tr. 259-262, 403, 406).

A review of the testimony finds that essential details of the events surrounding the entry of the agents into the apartment, as described by Moctezumo and Jimenez, was consistent, there being little difference in the recitation of those facts and details regarding entry of the agents into Moctezuma's second floor apartment. We believe it is significant that the defense witnesses' suppression hearing testimony matched the information in the affidavits given by Moctezuma, Crespo, and Jimenez. We find their version of events surrounding a forced warrantless entry into Moctezuma's apartment to be plausible. We find no material inconsistencies in the information given by these

witnesses; nor was there any impeachment of the information concerning a warrantless, nonconsensual entry into the apartment. We believe this significant in measuring the weight to be accorded the defense witnesses' testimony.

Accordingly, we conclude that the defendant's testimonial evidence concerning a nonconsensual-warrantless entry into Moctezuma's apartment is entitled to the very same weight this court gives to the testimonial evidence submitted by the government on this issue. This, of course, significantly impairs the government's ability to meet its burden to preponderate on this issue.

3. Moctezuma's Written Statement

The third factor we have considered in reaching our conclusion that the government did not preponderate on the issue of a consensual entry, or overcome by a preponderance of evidence that evidence in opposition submitted by defendants, is the content of the written statement of Moctezuma taken by the DEA Agents.

The government had elicited significant testimony as to the accuracy of the written statement taken from Moctezuma. Agent Walsh testified, on the taking of the statement, that he "went through it a few times, wanted to make the details be exact." He went back through the statement with Moctezuma " in doing the chronology of the events." (Tr. 144). Agent Walsh, stated he "wanted to make sure . . . that each, everything we had in there was exact in the way it happened." (Tr. 147). With the government's efforts to have the statement factually and chronologically correct, we give its contents more than just some

weight. And why not, this statement is the earliest recorded recollection of the events that took place at the Kildare residence on March 12, 1993. Both the DEA Agents and Moctezuma participated in its creation. Indeed, the statement was taken within hours of the arrests, unlike all other written statements submitted to the court.

In the written statement, Moctezuma states, "Myself and Eddie stayed in the living room and watched TV and listened to the stereo. The next thing I know, myself, Crespo, and Eddie were arrested by police." (Govt. Ex. 3). We find it pointedly material to the issues in this case that absent from this statement is any reference to Moctezuma hearing a police officer calling from the base of the steps, his leaving the living room to go to the steps, having a conversation, however brief, with the police officer, and then inviting the police officer up. Indeed, what we have is a statement that the defendants were watching television when dramatically and suddenly they were placed under arrest. We find little difficulty in concluding that this rendition of the events of March 12, 1993, closely matches both the testimony and affidavits of Moctezuma and Jimenez – to the effect that they were watching television when suddenly the police officers burst into the apartment placing them under arrest. The implication of this evidence is, of course, unchallenged by the government.

4. The Absence of Corroborative Testimony

Our fourth reason for finding that the government has not marshalled sufficient evidence necessary to preponderate on the issue of a consensual entry comes from the fact that it did not present any witness to corroborate the testimony of Agent Mitchem, notwithstanding that one was available. From the beginning of these proceedings, the government knew that defendants strongly disputed Agent Mitchem's rendition of the events surrounding entry into Moctezuma's apartment. Three separate affidavits were submitted in opposition to the government's portrayal of the consensual entry. Available to the government was Agent Walsh, who closely accompanied Agent Mitchem up the stairs and into the apartment. (Tr. 162, 194, 203). We find it curious that the government did not take testimony from Agent Walsh which might have corroborated the testimony of Agent Mitchem concerning Agent Mitchem's entry into Moctezuma's apartment. This is even more perplexing considering the fact that Agent Walsh testified in these proceedings on other matters. We find this absence but another factor leading to our conclusion that the government has not been able to preponderate on the issue of a consensual-warrantless entry into Moctezuma's apartment.

It is by reason of these discussed findings and conclusions that we conclude the government has not met its burden to preponderate on the issue that its warrantless entry into defendant Moctezuma's apartment was done with the consent of Moctezuma. Accordingly, Moctezuma's motion to suppress evidence should be granted.

## IV. MOCTEZUMA'S MOTION TO SUPPRESS STATEMENTS

Moctezuma has moved to suppress any and all oral or written communications, confessions, statements or admissions made by defendant prior to, at the time of, or subsequent to his arrest. Defendant complains that he had not been given his Miranda rights and warnings, that the DEA Agents knew that the defendant was an epileptic subject to seizures while under stress, and they continued to question him regardless of that fact. Defendant maintains that by reason of this, any statements made were the result of psychological and mental coercion and were involuntary. The defendant argues that the waiver form he signed resulted from government coercion. Finally Moctezuma argues he was never allowed to read any of the documents before he was required to sign them.

In response to Moctezuma's motion to suppress statements, the government has argued that no matters of substance were discussed with any of the defendants prior to their arrest, and that only after Moctezuma had executed a written waiver of his Miranda rights and a consent to search form did they take post-arrest statements.

We find that the government's position is supported by credible evidence and that the government has, by more than a preponderance of the evidence, established that the defendant was fully advised of his rights prior to any material statements being taken from him. Additionally, the evidence clearly establishes that no coercion was aimed at defendant Moctezuma and that all statements made by him were voluntary. Lastly we conclude

that Moctezuma's claims are not credible and not supported by the record.

The credible evidence established that once the government agents entered Moctezuma's apartment, and it was ascertained that no danger existed to them, the mood in the apartment became casual and relaxed. (Tr. 77, 163-166, 203-204). This situation continued as the agents decided to moved the individuals to the basement. (Tr. 166). For security reasons, two of the three individuals in the apartment were placed in handcuffs as they were transported to the basement. (Tr. 165). Moctezuma was not placed in handcuffs. (Tr. 166). When the parties arrived in the basement, they went to the laundry room, the handcuffs were then removed from Crespo and Jimenez. The mood in the basement continued in a relaxed manner. (Tr. 117-118, 126, 167). The agents again mentioned to the three individuals, as they first did in Moctezuma's apartment, that they were trying to sort things out in order to find out what the facts were concerning those arrested. (Tr. 117-188, 126, 167). Additional agents joined the defendant and Agents Mitchem and Walsh, and the conversation continued to be light with nothing of substance being discussed. (Tr. 117-118). Agent Krieg, the supervising agent, entered the laundry room where Moctezuma, Crespo, and Jimenez were standing. Agent Mitchem, at this time, was taking basic information from the individuals concerning their names, addresses, etc. (Tr. 168). Agent Krieg directed that a sweatshirt be brought to Moctezuma, since it was cold in the laundry room and he was wearing only a tee shirt. (Tr. 24). Agent Krieg then left the laundry room, shortly after which he was informed by Agent Walsh that a bag of money had

been found on the second floor. Agent Krieg placed the bag containing the money on a wall in the foyer next to the laundry room. Agent Krieg then returned to the laundry room and asked Moctezuma if he would accompany him out in the hallway. (Tr. 25). There in the hallway, Krieg and Moctezuma had a short discussion. Agent Krieg told Moctezuma he was in trouble and that everything that occurred in the residence related to drugs, to which Moctezuma replied, "I don't know anything about the money, I don't know anything about that bag." This statement was made by Moctezuma without any reference to the bag by Agent Krieg. (Tr. 26). Agent Krieg advised Moctezuma that he had not asked any questions about the money, but it was obvious that he knew what was going on and that he would be facing federal charges. Agent Krieg told Moctezuma that if he wanted to talk to him about it, now was the time, and that he would bring those things discussed to the attention of the prosecuting attorney. (Tr. 27). Moctezuma indicated he would like to talk to the agent, indicating he had nothing to do with the matter and that it was the others money and they were going to make it worth his while. (Tr. 28). Hearing this statement, Agent Krieg decided that Moctezuma would be arrested and he informed Moctezuma that he would take him upstairs very quietly and would give him a waiver of his rights and a consent form so he could make a complete statement. (Tr. 31).

When Moctezuma was given the form for signature, he was advised that he needed to read through it and if he didn't understand anything, Agent Krieg would explain the matter. Agent Krieg discussed with Moctezuma his rights as printed on the form. (Tr. 31-32). After

Moctezuma had signed the consent form, Agent Krieg and Moctezuma had a brief conversation about the events of the day (Tr. 32). The conversation was in English and Moctezuma was lucid, the atmosphere was relaxed, and there was nothing to indicate possible distractions from the matters at hand. (Tr. 32). No manner of coercion was displayed by any agent towards Moctezuma. Moctezuma, fully understood his rights, and he signed the forms willingly (Tr. 35). He then gave a statement. Moctezuma was apprised by Agent Krieg that a full statement would be taken from him after he was brought downtown to the DEA office. (Tr. 536).

Agent Krieg placed Moctezuma under arrest at approximately 4:35 p.m. It was 4:00 p.m. when the agents had entered Moctezuma's apartment. Accordingly, the time Moctezuma spent with the agents prior to his arrest was approximately 35 minutes.

Defendant, in his testimony indicated that he was brought from his upstairs apartment to the basement laundry room in handcuffs. (Tr. 269). He was told he was, "in deep, deep trouble . . . facing eight years." (Tr. 208). He stated he received no Miranda type warnings at any time (Tr. 268-269, 271-272); that he was presented with a waiver form and was not allowed to read the document. (Tr. 273). Moctezuma testified that he was taken back to his apartment where he was told to sign the form, all the while still in handcuffs. (Tr. 274, 278). Moctezuma was given no explanation nor was he read the contents of the waiver form. (Tr. 274-275). Defendant indicated that when he was brought to the DEA office, he was put in a room where a DEA Agent began questioning him. (Tr. 279). He again was told he was in deep trouble. (Tr. 279). Then

DEA Agent Walsh came in and asked Moctezuma to "tell me what happened;" the agent began to write down his answers. The agent continued to question Moctezuma, writing down his answers, although he was not asked if he was willing to give a statement; nor was he asked to read the statement prior to his signing; nor was he given any explanation as to the importance of his signing this statement as that statement might be used against him in a court of law. (Tr. 83). Defendant indicated he was in a nervous state of mind, shocked and felt "blocked, closed in." (Tr. 274). He testified he felt he did not have a choice whether to sign the statement or not. (Tr. 284).

We find the government's evidence concerning defendant Moctezuma's voluntary statements and the signing of the waiver of his rights form to be totally credible. The government has presented sufficient evidence that it advised Moctezuma of his Miranda rights and advised him about the full nature of the waiver of his rights. The credible evidence further established that any statements that were later obtained from Moctezuma was knowingly given, and came as a result of Moctezuma's own voluntary acts. We find no credence nor reliability in Moctezuma's testimony regarding his version of the events leading to signing the waiver forms, and the giving of an oral and written statement.

It is important to note that no more than 35 minutes elapsed from the time the DEA Agent entered Moctezuma's apartment to the time he was placed under arrest. His statement came shortly thereafter. We find no credible evidence indicating that Moctezuma was handicapped in anyway. This record is absent any showing of coercion towards Moctezuma by the DEA Agents. Agent

Krieg did, indeed, admonish defendant that he was in trouble by virtue of the drug dealing taking place in the building, but this is viewed as an honest assessment of Moctezuma's predicament and was not designed to trick the defendant or overbear upon his will so as to render any statements or a confession involuntary. We find Agent Krieg's testimony that Moctezuma stated, "yes, I'd like to talk to you" to be credible, and this, in conjunction with Moctezuma's other statements, certainly indicated his willingness to give a voluntary statement (Tr. 28). We find Moctezuma's testimony that he was not allowed to read the waiver, was not told anything about it, and was forced to sign the document while in handcuffs, simply incredulous.

We further give little credence to Moctezuma's testimony that his epileptic condition, and the absence of his medication, somehow incapacitated him and rendered him unable to make a voluntary choice as to the waiver. As earlier mentioned, from the time the DEA agents entered Moctezuma's apartment to the time of his arrest involved no more than 35 minutes and perhaps his statement occupied another ten minutes. We hardly believe this 35-45 minute period affected his mental or physical condition. In any event, his medication was brought to him either in the basement or at the DEA offices, and we concluded that his medical condition did in no way suffer, or affect his ability to knowingly and intelligently waive his rights, to answer questions, or make a voluntary statement. (Tr. 30).

Moctezuma's written statement also appears to be the product of a willing and knowledgeable decision. The description of the careful manner in which Moctezuma's

statement was taken, where corrections were entered chronologically to insure that the statement was correct, indicates the willingness and voluntary nature of the taking of the statements. (Tr. 144-147).

The record as it stands leads us to believe that Moctezuma, sensing that cooperation would be the best course of action to follow, voluntarily gave statements to the DEA Agents. Further, when it became evident that Moctezuma's statements showed his culpability in the drug transaction, the agent discontinued the inquiry and presented Moctezuma with the need for understanding what his rights were and the need for him to sign the waiver form if he were to continue to cooperate.

The fact that Moctezuma gave statements that do not appear to be in his self interest, does not contradict the fact that the statements given were motivated by what he felt at the time to be in his best interests – that being to cooperate. Even if we were to accord credibility to all of Moctezuma's subjective beliefs as to his custody and restraint of freedom, we nonetheless would rule that his motion to suppress statements should be denied. There was no coercion, in fact, present in this case; nor during the 35 minutes he was detained by the DEA Agents did they do anything that caused his free will to be overborne. There was no illegality to the manner in which the DEA Agents obtained statements from Moctezuma. *U.S. v. Hocking*, 860 F.2d 769, 774-775 (7th Cir. 1988). Accordingly, we find that defendant Moctezuma's motion to suppress statements should be denied.

## V. QUASHING OF ARRESTS

Since we denied defendant Crespo's motion to suppress evidence obtained in the second floor apartment, there certainly exists probable cause to effectuate his arrest. Accordingly, Crespo's motion to quash arrest should be denied. Similarly, with Moctezuma, while we granted the motion to suppress evidence of the bag of money and the triple beam scale, we nonetheless find his incriminating statements to be voluntarily given and legal. This presents probable cause for his arrest. Moctezuma's motion to quash arrest should also be denied.

## VI. THE GOVERNMENT'S EXIGENT CIRCUMSTANCES THEORY

The best we can make of the government's assertions that exigent circumstances existed for it to make a non-consensual-warrantless entry into the Moctezuma apartment is that such claims appear to be no more than a pretend-sour grapes argument. This record contains no evidence of any agent giving chase to any defendant, let alone seeing or hearing one running up the steps to the second floor apartment – all as testified to by Agent Mitchem:

> "I heard noises up the steps . . . I don't know if a person was running, a person was stomping, a person was loudly walking. I don't know." (Tr. 181).

Additionally, there was no possibility of danger to anyone going up the steps since the back of the house was guarded by two DEA Agents. (Tr. 121).

We find the government's argument peculiar, at best, since all of its case centers around its evidentiary portrayal of Moctezuma virtually inviting Agent Mitchem into his apartment, and where the environment was relaxed, light, and casual. (Tr. 77, 163-166, 203-204). We ask where is the alleged danger claimed by the government under its version of events that supports its exigent theory?

We see no evidence of the possibility of danger on the second floor by reason of the events in the basement. This is especially true by reason of the ease by which Agent Mitchem entered the first floor apartment (Tr. 173, 472-473) and, according to the government, his having to merely call upstairs to bring the occupants out so as to make entry into the apartment (Tr. 180-193). We have earlier described in detail the facts of this case; there is painfully little in that description to support this part of the government's case. As such, the government's theory as to the existence of exigent circumstances justifying a nonconsensual-warrantless entry into Moctezuma's apartment is rejected.

## CONCLUSION

For the foregoing reasons, it is hereby recommended that defendants Moctezuma and Crespo's joint motion to suppress evidence resulting from the entry into Moctezuma's second floor apartment and seizure of evidence by granted as to Moctezuma, but denied as to Crespo. It is further recommended that the joint motion to quash arrests be denied as to both defendants. Lastly, it is

recommended that Moctezuma's motion to suppress statements be denied.

Respectfully submitted,

/s/ Edward a. Bobrick
EDWARD A. BOBRICK
United States Magistrate Judge

DATE: July 2, 1993

Any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140 (1985); *The Provident Bank v. Manor Steel Corp.*, 882 F.2d 258 (7th Cir. 1989).

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July 2, 1993: This date a copy of this Report and Recommendation was mailed to each of the above listed attorneys.

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